

146 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Pacific Gas and Electric Company

Docket No. ER14-838-000

ORDER ACCEPTING NOTICE OF TERMINATION

(Issued February 21, 2014)

1. In this order, we accept Pacific Gas and Electric Company's (PG&E) notice of termination of the Small Generator Interconnection Agreement (SGIA) among PG&E as Participating Transmission Owner, El Peco Energy, LLC (El Peco) as Interconnection Customer, and the California Independent System Operator Corporation (CAISO) as Transmission Provider (collectively, Parties), to be effective February 24, 2014, as requested.

I. Notice of Termination

2. PG&E's proposed notice of termination pertains to the SGIA for El Peco's Solar Farm Project in Merced County, California (Project).¹ PG&E states that it is unilaterally filing the notice of termination because El Peco has not consented to the notice of termination. PG&E states that on August 16, 2013, it notified El Peco that the Project was in default (Notice of Breach) pursuant to section 7.6 (Default) of the SGIA because El Peco failed to provide the required financial security. PG&E further states that it notified El Peco that it had sixty (60) days to cure the default pursuant to section 7.6.1 of the SGIA.

3. According to PG&E, El Peco disputed PG&E's request for financial security and failed to provide the financial security during the sixty-day cure period. PG&E states that it then notified El Peco that the SGIA for the Project would be terminated pursuant to section 3.3.2 of the SGIA, which permits either party to terminate the SGIA after a default pursuant to section 7.6. PG&E explains that, if it does not have the customer's consent to terminate the SGIA, it is required to file a notice of termination with the

¹ The SGIA was executed by the Parties on October 17, 2012. PG&E designated the SGIA as Service Agreement No. 218 under its Transmission Owner Tariff, FERC Electric Tariff, Volume No. 5 and reported it in its Electric Quarterly Report (EQR) for the fourth quarter 2012.

Commission in lieu of entering the termination date in PG&E's subsequent EQR and removing the agreement from the EQR the quarter after it terminates.²

4. Finally, PG&E explains that it is submitting the Notice of Termination via eFiling v7.0 because there are no eTariff records to terminate since the SGIA was reported on PG&E's EQR and not filed with the Commission.

II. Notice of Filing and Responsive Pleadings

5. Notice of PG&E's filing was published in the *Federal Register*, 79 Fed. Reg. 651 (2014), with interventions and protests due on or before January 14, 2014. CAISO filed a timely motion to intervene and El Peco filed a timely motion to intervene and protest. On January 24, 2014, PG&E filed a motion for leave to file answer and answer.

6. In its protest, El Peco argues that PG&E's Notice of Breach is defective and inconsistent with the terms and conditions of the SGIA. El Peco states that for the reasons detailed in its September 9, 2013 Response³ (Response) to PG&E's Notice of Breach, no financial security is due to PG&E under the terms of the SGIA. El Peco further argues that PG&E's refusal to extend the milestones under the SGIA is a breach of the SGIA, and PG&E's request for security posting is invalid under any circumstances.

7. In its Response, which El Peco incorporates into its protest, El Peco contends that no financial security is due to PG&E at this time because the Parties agreed to a fourteen month extension to the In-Service Date for the Project, and all corresponding financial security payment milestones are similarly adjusted.⁴ El Peco states that Milestone (b),⁵ which calls for the initial financial security to be delivered, has been postponed. El Peco further states that amendments to the schedule were approved by the Parties in meetings

² PG&E notice of termination at 2 (citing *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 249 (2002) (cross-referenced at 99 FERC ¶ 61,107, at P 249 (2002))).

³ El Peco Motion to Intervene and Protest (Protest) at 2. El Peco's September 9, 2013 Response is included in Exhibit A of its Motion to Intervene and Protest.

⁴ The In-Service Date for the Project is reflected in the SGIA-Attachment 4 as Milestone (m) with a due date of November 15, 2014.

⁵ Milestone (b) is PG&E's commencement of engineering upon the Interconnection Customer providing PG&E with a written authorization to proceed and providing the required security. The SGIA specifies a milestone date of December 3, 2012.

in May 2013, and are currently pending final approval by CAISO.⁶ El Peco states that it has not authorized PG&E to commence engineering or construction activities for the Project as required by Milestones (b) or (c),⁷ and therefore pursuant to SGIA section 6.3.1, no corresponding financial security is required at this time.⁸

8. Also, in its Response, El Peco states that it requested in writing that PG&E provide it with a schedule and budget for its engineering and construction activities in order to understand PG&E's need for the financial security it has demanded. El Peco states that PG&E failed to provide the information it requested; therefore, El Peco provided through its Response a written notice to PG&E of its default pursuant to section 7.6.1 of the SGIA and requested that PG&E cure its default by providing the requested information immediately.⁹

9. El Peco also states that PG&E's refusal to extend the milestones under the SGIA is a breach of section 6.2 because it provides that any party may request an amendment to the milestone schedule, and the consent of the other parties shall not be unreasonably withheld unless one of three conditions is met. El Peco claims that PG&E has not met any of the three conditions to justify refusing to extend Milestone (b).¹⁰

10. In its Response, El Peco argues that PG&E's security posting request is invalid even in the absence of any proposed modifications or amendments to the milestones or any other provision of the SGIA. El Peco explains that SGIA section 6.3.1 contemplates El Peco providing financial security to PG&E on an incremental basis, for discrete portions of the interconnection facilities and network upgrades associated with the Project. El Peco states that Milestone (b) had an initial due date of December 3, 2012 and Milestone (c) had an initial due date of January 2, 2014 under the terms of the SGIA as executed in 2012. El Peco asserts that the only potential financial security obligation that is even remotely past due to PG&E is \$150,000 pursuant to Milestone (b) and not the \$630,000 security posting that PG&E demands based upon the entirety of the

⁶ El Peco Protest, Exhibit A at 2.

⁷ Milestone (c) is PG&E's commencing construction upon the Interconnection Customer providing PG&E with a written authorization to proceed and providing the required security.

⁸ El Peco Protest, Exhibit A at 3.

⁹ El Peco Protest, Exhibit A at 3.

¹⁰ El Peco Protest, Exhibit A at 3-4.

engineering, design and construction costs of the interconnection facilities and network upgrades associated with the Project.¹¹

11. Furthermore, El Peco states that on December 16, 2013, it formally suspended work under the SGIA pursuant to section 1.51 therein, Order No. 2006, and section 5.16 of the CAISO *pro forma* Large Generator Interconnection Agreement.¹²

12. In its answer, PG&E disputes El Peco's assertion that PG&E cannot require any financial security for any work on the Project until it receives El Peco's written authorization. PG&E states that the deadline for El Peco to provide written authorization to PG&E to begin work on the Project was December 3, 2012.¹³ PG&E explains that El Peco is a serial project that is subject to the requirement of SGIA section 6.3.1 that it post financial security "at least twenty business days prior to the commencement of the design, procurement, installation, or construction of a discrete portion of the Participating TO's Interconnection Facilities and Upgrades...."¹⁴ PG&E states that on May 16, 2013, it sent El Peco a letter advising it that PG&E is commencing with planning and construction of the Project and that El Peco must post 15 percent financial security within 30 days. PG&E states that after El Peco failed to post the requested financial security, it sent El Peco a notice of default on August 16, 2013, informing El Peco it had 60 days to cure the default or the SGIA would be terminated.¹⁵ PG&E states that El Peco failed to provide the requested financial security so it filed the instant Notice of Termination.

13. PG&E states that El Peco requested that CAISO suspend its SGIA on December 16, 2013, seven months after El Peco failed to provide the requested financial security posting. PG&E explains that El Peco's protest fails to note that CAISO denied its suspension request on December 20, 2013. CAISO reasoned that El Peco has no suspension rights to the SGIA because it is in breach.¹⁶ PG&E argues that its Notice of

¹¹ El Peco Protest, Exhibit A at 4-5.

¹² El Peco Protest at 2 and Exhibit B (December 16, 2013 Notice of Suspension).

¹³ PG&E Answer at 1.

¹⁴ PG&E Answer at 2 and Attachment 1, section 6.3.1.

¹⁵ PG&E Answer at 2 and Attachment 2 (PG&E's August 16, 2013 Notice of Breach).

¹⁶ PG&E Answer at 4 and Attachment 3 (CAISO's December 20, 2013 Response to El Peco's Request to Suspend the Project).

Termination is warranted given El Peco's failure to provide the required security and CAISO's rejection of El Peco's notice of suspension.¹⁷

14. PG&E further disputes El Peco's arguments that (1) no financial security is due to PG&E under the terms of the SGIA, (2) PG&E's refusal to extend the SGIA's milestone is a breach of the SGIA, and (3) PG&E's security posting is invalid under any circumstances. PG&E contends that it had the right to request the 15 percent security posting for discrete engineering and design work under SGIA section 6.3.1. PG&E states that El Peco fails to discuss the plain language of SGIA section 6.3.1, instead focusing on language in Milestone (b) related to El Peco providing a written authorization to proceed in addition to the required security.¹⁸ PG&E argues that it had the right to request the 15 percent security, noting that the December 3, 2012 deadline for Milestone (b) requirements to be met is long overdue.

15. PG&E acknowledges that the Parties began negotiations regarding a further extension of the Commercial Operation Date. However, PG&E notes that El Peco admits it never received final approval of a change from PG&E or CAISO. According to PG&E, it would not agree to changing the Commercial Operation Date since the Project was in breach of the financial security posting requirement.¹⁹ PG&E claims that it never made any commitment to amend Milestone (b) financial security deadline for reasons explained in its August 16, 2013, Notice of Breach.²⁰

16. PG&E states that in its May and August, 2013 letters it informed El Peco that PG&E needs to begin initial engineering and design activities to determine if there are any physical interdependencies with other work, to actively manage the project in PG&E's portfolio, and to take advantage of potential efficiencies from bundling this with other work to save ratepayer money.²¹ In its Notice of Breach, PG&E states that not all milestones can be extended commensurate with the new commercial operation date, but it will partner with El Peco to delay work that does not adversely impact other queued customers or ratepayers. PG&E states that it offered to delay the financial security posting date until the end of August, if it received a written agreement from El Peco to

¹⁷ PG&E Answer at 2 and Attachment 3 (CAISO's December 20, 2013 Response to El Peco's Request to Suspend the Project).

¹⁸ PG&E Answer at 3 and Attachment 1 (Attachment 4 Milestones).

¹⁹ PG&E Answer at 4 (citing El Peco's Protest, Exhibit A at 2).

²⁰ PG&E Answer at 4 and Attachment 2 (August 16, 2013 Notice of Breach).

²¹ PG&E Answer at 3 and Attachment 2 (August 16, 2013 Notice of Breach).

include that date in the milestone table in the SGIA amendment then being negotiated; however, El Peco declined.²²

III. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answer filed by PG&E because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

19. We agree with PG&E that El Peco breached the SGIA by failing to provide required financial security, PG&E followed the required steps under the SGIA to terminate the agreement, and thus we accept PG&E notice of termination of the SGIA. Specifically, El Peco failed to meet the Milestone (b) due date of December 3, 2012, to post financial security. Although El Peco claims that in May 2013 (five months after the December 2012 Milestone (b) date) the due date for Milestone (b) was extended, El Peco states that this change is pending final approval by the CAISO.²³ However, PG&E submits evidence that CAISO rejected El Peco's notice to suspend work on the Project because El Peco is in breach of the SGIA.²⁴

20. We find that PG&E followed the procedures in the SGIA by submitting to El Peco a notice of breach/default and a notice of termination. Under section 7.6.1 of the SGIA, the defaulting party shall have sixty (60) calendar days from receipt of the default notice within which to cure such default. However, if the defaulting party is not capable of timely curing the default, then it should commence such cure within twenty (20) calendar

²² PG&E Answer at Attachment 2 (August 16, 2013 Notice of Breach).

²³ El Peco Protest at Exhibit A (El Peco's Response to PG&E's August 16, 2013 Notice of Beach).

²⁴ PG&E Answer at Attachment 3 (CAISO's December 20, 2013 Response to Request to Suspend El Peco Project).

days after the default notice and continuously and diligently complete such cure within six months from receipt of the default notice.²⁵ El Peco did not cure the default.

21. We also reject El Peco's argument that PG&E is unable to require any financial security before receiving written authorization to proceed. We find that the provisions of Milestone (b) must be read in tandem. The due date of December 3, 2012 required El Peco to provide both the required security and written authorization to proceed by that date. If El Peco had justification for failing to provide both the required security and a written authorization to proceed, El Peco would have been required to present that justification and seek to extend the milestone before it became in breach.

22. The Commission rejects El Peco's claim that PG&E's refusal to extend the SGIA's milestones is a breach of the SGIA. We find that the conditions cited by El Peco as the only bases upon which PG&E could decline to extend milestones do not apply when the party requesting milestone extension is in breach of the SGIA.²⁶ Thus, we find that PG&E appropriately followed the default/termination provisions of the SGIA.

23. Accordingly, we find that the notice of termination is just and reasonable and not unduly discriminatory or preferential, and we will therefore accept PG&E's filing.

The Commission orders:

PG&E's notice of termination is hereby accepted, effective February 24, 2014, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁵ PG&E Answer at Attachment 2 (SGIA section 7.6.1).

²⁶ See *Midwest Indep. Sys. Operator, Inc.*, 141 FERC ¶ 61,097, at P 41 (2012) (finding that an interconnection customer that fails to meet its requirements may be in breach and subject to the termination process of the SGIA).